secutor has been conferred by the Constitution and federal laws with certain powers for him to play a vital role in the administration of justice. Because of the constitutional position of the Public Prosecutor in our system it is naturally expected of him to exercise these powers with the highest professional integrity and the courts have to presume that his actions are *bona fide* unless shown to the contrary.

As regards section 418A(3) leaving no discretion to the Magistrate or President I need only say that section 418A is not unique. Under section 339 of the CPC (an original provision) the Public Prosecutor may at any time direct a Magistrate to hold an inquiry under Chapter XXII of Part VIII of the CPC into the cause of, and the circumstances connected with any death and the Magistrate to whom such direction is given *shall* thereupon proceed to hold the enquiry. When such an enquiry has been closed if it appears to the Public Prosecutor that further investigation is necessary, the Public Prosecutor may *direct* the Magistrate to reopen such an inquiry and make such further investigation as he may direct. Again Article 145(3) of the Federal Constitution confers on the Attorney-General the power of *nolle prosequi.* By virtue of that power the Attorney-General may in any criminal prosecution enter a *nolle prosequi* at any time before judgment. Surely it cannot be said that all these powers of the Attorney-General intrude on the judicial powers of the courts!

Therefore I can come to no other conclusion but that section 418A of the CPC does not constitute an intrusion into the judicial power of the courts.

I would accordingly allow the appeal and set aside the order of the judge.

Appeal dismissed.

Solicitors: *Sri Ram, Zulkifli & Kumar.*

NG KHENG YEOW v. CHIAH AH FOO & ORS.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C.JJ.) October 13, 1986 & February 21, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 378 of 1985]

Land Law – Caveat – Whether entry of private caveat gives priority – Competing equities – Better equity prevails.

The first three respondents owned a piece of land in Penang. They charged the land to the Malayan Banking for overdraft facilities. On March 18, 1982 they executed an agreement to sell the land to the 4th respondent. However on April 23, 1982 they executed another agreement to sell the land to the appellant. On August 19, 1982 the 4th respondent lodged a caveat. The appellant had lodged a caveat earlier.

In July 1984 the 4th respondent settled the overdraft facilities. The discharge of the charge was duly executed and the title deed was given to the 4th respondent. The vendors had executed the Memorandum of Transfer in favour of the 4th respondent's nominees. Apart from caveating the land the appellant had also obtained an order restraining the first three respondents from transferring, selling, disposing or otherwise encumbering the land. The 4th respondent asked the appellant to withdraw the caveat but he refused. Action was brought and the learned Judge made an order setting aside the caveat and the injunction and awarding damages to the 4th respondent. The appellant appealed.

Held, dismissing the appeal: in this case the 4th respondent had the better equity and the only thing against him is that he entered the caveat later than the appellant. However on the facts he had the better equity and the rule that he "who has the better equity" prevails, applied.

Cases referred to:

(1) *Eng Mee Yong & Ors.* v. *Letchumanan* [1979] 2 M.L.J. 212.
(2) *Macon Engineers Sdn. Bhd.* v. *Goh Hooi Yin* [1976] 2 M.L.J. 53.
(3) *Piang Hong Yon & Ors.* v. *Syarikat Seri Belian Sdn. Bhd.* [1982] 1 M.L.J. 196.
(4) *Haroon bin Guriaman* v. *Nik Mah bte. Nik Mat & Anor.* [1951] M.L.J. 209.
(5) *Chatib bin Kari* v. *Mosbert Bhd.* [1984] 2 M.L.J. 67.
(6) *Crosbie-Hill* v. *Sayer* [1908] 1 Ch. 866, 875.
(7) *Zeno Ltd.* v. *Pre-Fabricated Construction Co. (Malaya) Ltd. & Anor.* [1967] 2 M.L.J. 104.
(8) *Butler* v. *Fairclough* (1916-17) 23 C.L.R. 78.
(9) *Syed Ibrahim bin Syed Abdul Rahman* v. *Liew Su Chin* [1984] 1 M.L.J. 160, 163.

SUPREME COURT.

Yusuf Khan for the appellant.
Lim Seong Chun for the 4th respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): This is an appeal against the order made by the learned Judge in setting aside the caveat and the injunction and awarding damages to 4th respondent without a full trial.

The first three respondents ("the vendors") owned a piece of land described as Geran No. 5700 for Lot 87 in the district of Pusing together with the building known as No. 16, Lahat Road, Pusing, Perak ("the land"). They charged "the land" to the Malayan Banking for $50,000 for overdraft facilities. On March 18, 1982, they executed an agreement to sell "the land" to the 4th respondent. By way of deposit and part payment 4th respondent paid them $28,000. The balance of $47,000 was to be made within one month from July 27, 1982, to settle the overdraft facilities. If it was insufficient then the vendors would have to settle with the bank. 4th respondent was entitled to specific performance of the agreement. On April 23, 1982, they executed another agreement to sell "the land" to the appellant, also for $75,000. The appellant paid a deposit of $25,000. As to the balance of $50,000 the appellant agreed to redeem "the land" within 6 months from the bank with the balance. On August 19, 1982, the 4th respondent lodged a caveat. The appellant had lodged a caveat earlier.

Sometime in July 1984 the 4th respondent deposited a cheque for the sum of $47,000 with Messrs Ngan & Tan, the bank's solicitors. Eventually, the discharge of the charge was duly executed, the title deed was given to 4th respondent. The vendors had executed the Memorandum of Transfer in Form 14A in favour of 4th respondent's nominees, Lim Bee Bee (f) and Lim Ching Wan. Apart from caveating "the land" the appellant also obtained an order dated October 24, 1983, restraining the first three respondents from transferring, selling, disposing of or otherwise encumbering "the land." The 4th respondent contacted the appellant asking him to withdraw the caveat but he refused. The appellant showed the 4th respondent his agreement which was more than a month later than the 4th respondent's agreement. Because of non-payment of the balance of the purchase price by the appellant there was a serious breach of the terms of the agreement. Clause 5 of the agreement makes time the essence of the agreement. By paying the full purchase price the 4th respondent had become the beneficial owner. The first three respondents were merely bare trustees for the 4th respondent. There was therefore no interest against which the appellant's caveat could lie.

The appellant contended that the learned Judge was wrong in law. The burden was on the respondent. The question was whether the caveat was wrongfully entered or entered without reasonable cause. In this case there were competing equities. It was submitted that when faced with these facts the learned Judge should not set aside the caveat and the injunction but to decide on the conflicting equities. In support the following cases were cited: *Eng Mee Yong & Ors.* v. *V. Letchumanan*[1]; *Macon Engineers Sdn. Bhd.* v. *Goh Hooi Yin*[2]; *Piang Hong Yon & Ors.* v. *Syarikat Seri Belian Sdn. Bhd.*[3]; *Haroon bin Guriaman* v. *Nik Mah bte Nik Mat & Anor.*[4]; and *Chatib bin Kari* v. *Mosbert Bhd.*[5]

Although both the appellant and the 4th respondent were in breach of the terms of the agreement in respect of the final payment the vendors had waived the breach against the 4th respondent by accepting the final payment made by the latter. The appellant only offered to make the final payment on May 16, 1983, but the vendors refused to accept and finalise the discharge of the charge. As a result of the breach the vendors were entitled to treat the agreement as terminated.

On the facts of this case the entry of a private caveat by one party does not necessarily mean that he has better priority against another who has not as yet lodged one. In *Crosbie-Hill* v. *Sayer*[6] on the question of priority Parker J. stated at page 875:

> "... The mortgages to the plaintiffs and the mortgage to the first two defendants are thus all of them equitable mortgages only, and the question I have to decide is whether the plaintiffs or these two defendants have the better equity ...".

This passage found support in *Zeno Ltd.* v. *Prefabricated Construction Co. (Malaya) Ltd. & Anor.*[7] where the Federal Court held, *inter alia,* that the caveat established priority and the onus was therefore on the holders of a subsequent equity to show facts which rendered it inequitable for the holder of a prior equity to insist as against him on that priority. Although priority in time is the ordinary test, in the final analysis where evidence discloses some act or omission on the part of the holder of a prior equity the rule that "who has the better equity" as stated by Parker J. in *Crosbie-Hill* v. *Sayer* applied.

In the Australian case of *Butler* v. *Fairclough*[8] reference may be made to a passage by Griffith C.J. who expressed similar sentiments:

"... In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice. Thus, if an equitable mortgagee of lands allows the mortgagor to retain possession of the title deeds, a person dealing with the mortgagor on the faith of that possession is entitled to priority in the absence of special circumstances to account for it."

In *Syed Ibrahim bin Syed Abdul Rahman* v. *Liew Su Chin*[9] the Federal Court made clear that:

"... It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet Judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible. As Lord Diplock said in *Eng Mee Yong's* case at page 217:

'... In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to meet further investigation as to their truth. Since this is a matter upon which the opinion of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under section 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong.' "

The submission of the 4th respondent that he has better equity is well founded. He entered into the sale agreement with the vendors first. He had paid the full purchase price. The vendors had executed the Memorandum of Transfer in his favour. Also, most important the title deed is in his possession. He had become the beneficial owner. The only thing against him is that he entered the caveat later than the appellant. However, we are satisfied that on the facts he has the better equity.

We cannot say the learned Judge was wrong in the order he made in the circumstances. The appellant has not been able to persuade us to interfere with the decision of the learned Judge. Accordingly, we would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Yusuf Lee Pathma & Marbeck; Ngan & Chen.*

GUNUNG BAYU SDN. BHD. v. SYARIKAT PEMBINAAN PERLIS SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C.JJ.) September 17, 1986 & February 27, 1987]

[Kuala Lumpur – Supreme Court Civil Appeals Nos. 16 and 32 of 1985]

Practice and Procedure – Summary judgment – Building contract – Certificate of architect – Whether matter should be dealt with by arbitration – Triable issues – R.H.C. 1980, O. 14.

Contract – Building contract – Certificate of architect – Whether valid certificate – Certificate signed by unregistered architect.

Architect – Whether graduate architect who has not been registered entitled to sign certificate – Architects Act, 1967, ss. 2, 7 & 10.

The appellants had entered into a building contract with the respondents, a firm of building contractors for the construction of a housing scheme. The contract provided for progress payments to be made based on interim certificates to be issued by the appellant's architect who was Hajjas Kasturi Associates Sdn. Bhd. The contract also contained the usual arbitration clause. The work proceeded and interim certificates were issued for work done. These were signed by a graduate architect who had not been registered. The appellants refused to honour the certificates and the respondents terminated the contract and filed a writ against the appellants. The appellants applied to have the writ struck out on the ground that under the agreement the parties have agreed to go to arbitration in the event of "any dispute or difference." This application was heard and dismissed.

The respondents then applied for summary judgment on the sums due on the interim certificates. The appellants applied for a stay of the respondents' application for summary judgment pending the outcome of their appeal against the dismissal of the application to strike out the respondents' writ.

The learned Judge gave judgment in favour of the respondents and the appellant appealed. On the appeal it was argued (1) that this was not a proper case for summary judgment and (2) that, if not, the matter should go to arbitration.

Held: (1) there appears to be a plenitude of triable issues in this case. It is trite law that leave to defend must be given unless it is clear that there is no real substantial question to be tried or unless there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment;

(2) the appeal is allowed and by consent the parties will submit their dispute to arbitration.

Cases referred to:

(1) *Mottram Consultants Ltd.* v. *Bernard Sunley & Sons Ltd.* [1975] 2 Lloyd's Rep. 197.
(2) *Codd* v. *Delap* (1905) 92 L.T. 510.